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Clifton M. Bowden v. The Denver and Rio Grande Western Railroad Company : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

CLIFTON M. BOWDEN,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

Case No.
~~7478~~
8054

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an intermediate appeal from the Honorable Judge Martin M. Larsen granting plaintiff a new trial from a judgment in favor of defendant and against plaintiff "no cause of action" (R. 229-230). The action was brought under the Federal Employers' Liability Act, Title 45, Section 51 U. C. A. for injury allegedly sustained by plaintiff at Soldier Summit on December 21, 1951. Plaintiff alleged in his complaint the following grounds of negligence:

> "1. That the defendant failed and *neglected* to use reasonable care to furnish plaintiff a reason-

ably safe place in which to work in this: that the said defendant in the clearing of the snow from the tracks at Soldier Summit and in the vicinity where plaintiff was injured failed to clean the tracks a sufficient distance from the track in order that persons riding on the stirrups or side of the engine or cars could do so in safety and without having the said snow come in contact with them, thereby causing them to fall to the ground and be injured.

"2. That the defendant *negligently* failed to have sufficient clearance between the side of its engine and the snowbank on the right side of said eastbound engine.

"3. That the defendant *negligently* failed to warn its employees or to place any warning sign that there was insufficient clearance between the cars or engine and the snowbank at the side of the tracks at Soldier Summit where the plaintiff was injured" (Italics ours).

Inasmuch as this is an intermediate appeal relating only to two instructions given by the Court the facts will be outlined only briefly. Plaintiff while working as a trainman in the yards at Soldier Summit in the early morning hours of December 21, 1951 was allegedly injured. The weather on that occasion was extremely cold and wintry and there had been many severe storms during that month. At the time of the accident it was snowing. This snow had been drifted by the wind which had been blowing during the night. Considerable testimony was introduced showing that the winter of 1951 and 1952 had been unusually severe and that the Railroad had had great difficulty in keeping its tracks at Soldier Summit cleared (R. 17). Cleaning crews were working day and

night to keep the main line and the passing lines cleared of snow and ice (R. 117). The track upon which the train was operating on which plaintiff was working at the time of the accident had been cleared of snow in the usual and customary manner a few hours prior to the accident. Railroad snow crews were working upon other tracks in the vicinity of Soldier Summit at the time the accident occurred (R. 118-119).

During the month of December the Railroad had hired many additional employees to aid in keeping the tracks clear of snow and ice (R. 116). The freight train with which plaintiff was working consisted of approximately 80 cars. At the time of the incident complained of it was moving east into the passing track at Soldier Summit to allow a westbound train to pass on the mainline track. Soldier Summit is one of the highest points on the defendant Railroad. In movements east from the Summit trains move down grade. It was therefore necessary that retainers on the cars be set at Soldier Summit to control the speed of the train in its down grade movement (R. 14).

Plaintiff testified that while he was standing on the side ladder of the engine waiting to step down from the engine for the purpose of setting retainers on the cars the snow alongside the tracks pushed up against his feet causing him to fall from the engine and sustain his injuries (R. 17). He testified that there was an area of 100 feet in length at the point where this incident occurred where there was a close clearance between the snowbanks and the sides of the cars.

There was no evidence that the defendant Railroad had actual knowledge of the alleged close clearance between the snowbanks and the sides of the cars. Furthermore the testimony relative to the amount of clearance was conflicting. The testimony failed to show whether the snow which had created the alleged close clearance had drifted or fallen, or for that matter when it had drifted or fallen in said place. As herein indicated it was undisputed that the track where the accident occurred had been cleared of snow a few hours prior to the accident. In its instructions to the jury the trial court gave instructions 9 and 10, which instructions are as follows:

"INSTRUCTION NO. 9

"In order to find that the railroad was negligent in failing to provide a safe place to work in this case, you must find by a preponderance of the evidence that

"(1) The railroad knew, or by the exercise of reasonable care, should have known that there was snow or other substance near the tracks at the point of the accident, which snow or substance created a situation which was not a reasonably safe place for railroad workers to work; and

"(2) That the railroad had a reasonably sufficient period of time within which to eliminate said snow or substance and could reasonably have eliminated it, and failed to do so."

"INSTRUCTION NO. 10

"In order to find that the railroad was negligent in failing to warn plaintiff by warning sign or

otherwise of the alleged insufficient clearance between the cars or engine and the snow-bank at the side of the tracks near the point of the accident, you must find that

"(1) There was in fact an insufficient clearance between the said cars or engine and the snow-bank; and

"(2) That the railroad knew, or, by the exercise of reasonable care, should have known of said insufficient clearance and should reasonably have known that it created an appreciable risk of harm to railroad workers; and

"(3) That the railroad had a reasonable opportunity to warn plaintiff of said condition, and failed to do so."

The jury returned a verdict in favor of the defendant Railroad and against the plaintiff "no cause of action" and judgment was entered thereon. Thereafter a Motion for New Trial was made by plaintiff in which plaintiff claimed that Instructions No. 9 and 10 were erroneous. After argument on said Motion for New Trial the trial court took the matter under advisement and thereafter granted plaintiff a new trial expressly basing its decision upon the ground set forth in the memorandum decision found at page 229-230 of the record. In this decision the Court isolated the grounds upon which it granted the Motion for a New Trial for the very purpose of giving this Court an opportunity to review by intermediate appeal. The Honorable Trial Judge in his written opinion in holding that Instructions No. 9 and 10 were erroneous said:

"Since this case was heard, the Supreme Court in this state has handed down his decision in the

case of *Butz* vs. *Railroad Company,* ____ P. 2d. ____ (not yet in Utah Reports). Under the language in that opinion, the Court concludes that Instructions 9 and 10 in the Court's Charge to the Jury were erroneous, and, for that reason and upon that ground, plaintiff's motion for a new trial is granted, the judgment heretofore vacated and set aside, and the cause remanded to the trial calendar for retrial."

STATEMENT OF POINTS

The Trial Court erred in granting a Motion for New Trial on the grounds that Instructions Nos. 9 and 10 were erroneously given for the reason that said instructions correctly state the law applicable to the facts in the instant case.

ARGUMENT

The Trial Court specifically stated that because of *Butz* vs. *Union Pacific Railroad Company,* ____ Utah ____, (233 P. 2d 332,) which was decided after the instant case had been tried, he felt that instructions Nos. 9 and 10 had been erroneously given.

In the *Butz* case, *supra,* the facts were briefly as follows:

Plaintiff was injured while working as a switchman on the baggage trucks of the Union Pacific Railroad Company. While riding on the side of a car he struck his back against a baggage truck which had been left so close to the tracks that it created a hazardous condition. It was assumed in the court's opinion that the baggage truck had not been left in a dangerous position by agents of the Railroad Company but had been so left by third parties.

The Trial Court granted a non-suit apparently on the ground that there was no evidence showing that the defendant Railroad was negligent and probably on the further ground that the evidence showed as a matter of law that the sole proximate cause of plaintiff's injuries was his own contributory negligence. Justice Crockett, writing for a majority of the Court consisting of Justices Wade and McDonough, held that the case should have been submitted to the jury on the question of defendant's negligence. The Court said:

> "There is abundant authority that a defendant employer is charged with responsibility for conditions of danger upon the property of others of which it *either has actual knowledge or is charged with constructive knowledge because the hazard is of such a nature and has existed for sufficient time that in the exercise of reasonable care the employer should have discovered it*" (Italics ours).

The Court further said:

> "The test is not whether afterward one may see a way that the injury could have been prevented but whether the Railroad in the exercise of ordinary prudence and care *should have reasonably forseen* the likelihood of injury. Under the circumstances in the instant case, this is a matter upon which reasonable minds could well differ" (Italics ours).

The Court then quoted from Justice Black in the case of *Wilkerson* vs. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, wherein Justice Black said:

> "* * * respondent's argument held * * * that the Federal Act does not make the Railroad an absolute insurer * * * *that proposition is cor-*

*rect * * * the Act imposes liability only for negligent injuries. * * * But the issue of negligence is one for juries to determine * * *"* (Italics ours).

Justices Wolfe and Lattimer dissented on the grounds that the non-suit was properly granted.

We have no quarrel with the *Butz* case. It simply holds that the Trial Court should have permitted the case to go to the jury on the question of whether or not the defendant Railroad was negligent in failing to provide the plaintiff with a safe place to work.

There is considerable difference between the *Butz* case and the instant case. The *Butz* case was not submitted to the jury; the instant case was submitted. The Court did not hold in the *Butz* case that the Union Pacific Railroad company had an absolute duty to furnish plaintiff with a safe place to work; it held that a jury should be permitted to find whether or not the Railroad negligently failed to provide a safe place to work. In the case at bar the jury was instructed that they could not so find unless the Railroad knew or in the exercise of reasonable care should have known of the dangerous condition allegedly existing.

If the *Butz* case holds that a defendant is chargeable with something more than the exercise of reasonable care then the *Butz* case has established a rule of law of absolute liability. We are sure this was not the intention of this Honorable Court nor do we think a fair reading of that case so indicates.

As herein indicated, evidence was introduced from which a jury could have found that snow alongside the

track had not been removed near a battery box stand for the reason that the snowplow blade had to be pulled up at that point to avoid striking and damaging the box. Other evidence indicated that newly drifted snow was accumulating alongside the track. The undisputed physical evidence showed that plaintiff could not have encountered the snow left remaining near the battery box. This was established by the testimony of plaintiff, who stated that the battery box was approximately 25 to 30 car lengths from the point where the passing track joins the mainline at the east end of the yard (R. 41). Other witnesses testified that the battery box was more than 25 to 30 car lengths from the switch point. Mr. Hales, called by plaintiff placed it 50 or 60 car lengths away (R. 82). The physical fact, shown by actual measurement is that the battery box was 1716 feet west of the dwarf signal which is at the point where the east end of the passing track joins the mainline (R. 129).

The significance of this testimony is that the plaintiff testified that when the train came to a stop he was on the ground approximately 40 feet west of the tender (R. 46).

Mr. Williams, the engineer, testified that the train in question consisted of an engine and tender on the head end pulling 88 mine empties followed by a caboose and helper engine. In all the train consisted of 92 cars, including the engines (R. 162). The time table shows that the passing track holds 105 cars (R. 129). The engineer further testified that it is customary to pull the train all the way into the passing track so that the rear end would not foul the main line (R. 162). Following this custom he pulled

the engine all the way into the track until he reached the dwarf switch at the east end of the yard before he came to a stop (R. 162). This was almost a quarter of a mile from the battery box. How then could plaintiff have struck snow near this box? We are confident that the jury concluded he did not. The only other snow near enough to the track to constitute a possible hazard was snow *that may* have accumulated by drifting along side the tracks in the early morning hours.

The plaintiff testified that while he was standing in the snow and wind on the step of the engine all he could see was flying snow and steam (R. 63). He did not know whether there was one inch clearance or three feet (R. 63).

The jury undoubtedly found that if plaintiff's foot encountered snow, as he testified, it was newly drifted snow that had accumulated during the early morning hours along the side of the track. The court by instructions Nos. 9 and 10 in effect advised the jury that if this occurred the Railroad would not be liable unless the Railroad knew or in the exercise of reasonable care should have known that such drifts existed. If the case was to be submitted on the pleaded issue of negligence what other instruction could the court have given? If the court had failed to so instruct the jury could have found the Railroad liable simply because plaintiff's foot caught in a snowdrift. Such finding would be based on liability without fault unless the Railroad knew or should have known of the hazard so that it could have been prevented.

It will be observed that the plaintiff alleged in his complaint certain grounds of negligence which had been set

out herein. In every instance the plaintiff alleges that the things which defendant did were done negligently. Negligence means the doing or the failure to do what an ordinary reasonable man would not do or fail to do.

We submit that there was clearly competent evidence from which the jury could very reasonably have found that the defendant did not know and could not reasonably have known of the existence of an alleged close clearance and the defendant had no reasonable opportunity to correct this condition or warn the plaintiff about it. We therefore believe that the Court's instructions correctly set forth defendant's theory of the case and were based upon the competent evidence supporting such theory.

The Courts have consistently held that the plaintiff must prove that the Railroad either had actual knowlege of the alleged unsafe condition or that in the exercise of reasonable care the Railroad should have known of it. This we believe is exactly what was held in the *Butz* case, *supra.*

In *Wilkerson* v. *McCarthy,* 336 U. S. 940, 69 S. Ct. 413, U. S. Supreme Court reiterated the rule that liability in Federal Employers' Liability case is based on fault. Justice Douglas, in a special concurring opinion, said:

> "the basis of liability under the act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negligence."

Justice Black, speaking for the majority of the Court, said:

> "There are some who think that recent decisions of this Court which have required submission of

> negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' * * * This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible."

The Federal Courts, in determining this question, have uniformly held that a railroad is responsible under the act for acts of negligence only where the act or omission is either known or something that the railroad in the exercise of reasonable care should have known. Thus in *O'Mara* v. *Penn. R. R. Co.*, 6 Cir. 95 F. 2d 762; and *Hatton* v. *New York, New Haven & Hartford R. Co.*, 1 Cir. 261 Fed. 667, and as quoted in *Kloetzer* v. *Louisville & N. R. Co.*, 95 N. E. 2d 502; 341 Ill. App. 478, it is held:

> "Under the Federal Employers' Liability Act, a railroad company may be responsible to an employee for failing to provide a safe place to work, only if the company knew or in the exercise of reasonable care should have known of the unsafe condition."

Other federal cases which so held are:

Southern R. Co. v. *Stewart*, 115 F. 2d 317;

Schilling v. *Delaware & H. R. Corp.*, 114 F. 2d 69;

Saunders v. *Longview, D. & N. R. Co.*, 296 P. 835.

CONCLUSION

The lower court's decision granting a new trial as herein indicated was based entirely on the court's conclusion that the *Butz* case had ruled that the Railroad could be held liable even though it did not know of the existence of the alleged hazard and even though it could not, in the exercise of reasonable care, have known of its existence. We believe, and have tried to show, that this Honorable Court did not so hold in the *Butz* case. All this Court held was that a jury should have been permitted to find whether or not the Union Pacific Railroad knew or should have known that a hazard existed by reason of close clearance caused by baggage trucks being left near the tracks. For these reasons we respectfully submit that the trial court's decision granting a new trial should be reversed and the jury's verdict of "no cause of action" be permitted to stand.

Respectfully submitted,

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